IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.283 OF 1989

1. Mahabubi Gulabkhan Pathan
2. Gulabkhan Mehabubkhan Pathan ..Appellants

V/s

The State of Maharashtra ..Respondent

None for the appellants.

Mr. A.S. Shitole, APP for the State.

CORAM: V.M. KANADE, J.
DATE : 23rd February, 2005

ORAL JUDGMENT:

1. Heard the learned Counsel appearing for the State.

None appears for the appellants.

2. The learned APP appearing for the State has taken me through the judgment and order of the Trial Court as also the evidence adduced by the prosecution.

3. Prosecution's case in brief is that the information was received by the Officer that the accused used to sell Charas at their residence. Accordingly, the raid was conducted at 7.15 p.m. At the time of the raid, accused No.1 was present in the house. Accused No.2, the husband of accused No.1, was not present in the house. It is alleged that 78 gms of Charas was found below a pot in the house.

4. The Trial Court has convicted both the accused on the basis of the evidence adduced by the prosecution and sentenced them to undergo R.I. for 10 years which is the minimum sentence prescribed under the N.D.P.S. Act prior to its amendment in the year 2001.

5. The Trial Court has observed that there is violation of the provisions of Section 42(1) of the N.D.P.S. Act inasmuch as the information which was received by the Head Constable was not reduced into writing and that no intimation was given to the Superior Officer and that the raid was conducted in the evening after the sun set at about 7.15 p.m. and special reasons for raiding the place after the sun set were admittedly not recorded. The Trial Court has observed that no prejudice is caused to the accused on account of noncompliance of section 42(1). In my view, finding of the Trial Court on this aspect cannot be sustained. In the first place, though the provisions of section 42 are not mandatory, the noncompliance of the said provisions clearly show that there is a serious lacuna in the investigation and thus it creates serious doubt about the prosecution case. Apart from this lacuna, the seizure of the contraband from the accused has not been proved

through the independent witness. One panch witness was not traceable and hence was not examined and the other panch turned hostile. Thus the evidence regarding seizure of the contraband is only in the form of evidence of the Police Officers. The prosecution also has failed to establish that the house in which the contraband was found belonged to the accused.

6. In the light of the aforesaid lapses on the part of the prosecution, benefit of doubt will have to be given to the accused. Accordingly, the following order is passed:-

O R D E R

. Appeal is allowed.

. Judgment and Order of the Trial Court is set aside.

. Accused are acquitted of the offence with which they are charged.

. Appellants are on bail. Their bail bonds to stand cancelled.

V.M. KANADE, J.